14585

No. 111.

Brief of Foster for P. C.

Office Supreme Court U.S.
FILED
NOV 14 1902
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

Filed Nov. 14, 1902.

WILLIAM SAMUEL BIGBY,
Plaintiff in Error,

AGAINST

THE UNITED STATES OF AMERICA,
Defendants in Error.

111

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error to a judgment of the Circuit Court of the United States for the Eastern District of New York sustaining a demurrer to a petition to recover a claim against the United States under the Tucker Act of March 3, 1887.

Plaintiff's Brief in Opposition to Demurrer.

The petition sets forth the cause of action as follows:

"III. On or about November 27th, 1893, your "petitioner at the request of the said United States "of America and at the request of the officers, em- "ployees and duly authorized agents of the said "United States of America, each of which officers,

" agents and employees was acting within the scope of " his authority, entered into a passenger elevator in " the United States Court House and Post Office " Building in said Borough of Brooklyn, which said " building and elevator were then owned and con- " trolled by the United States of America, and which " elevator was designed and intended by the said " United States of America for the use of persons on " their way to the office of the Marshall of the United " States for the Eastern District of New York; which " entry was made by our petitioner while on his way " to said Marshall's office upon official business."

" IV. The United States of America then and there " entered into an implied contract with your petitioner " wherein and whereby for a sufficient valuable con- " sideration it agreed to carry your petitioner safely; " to operate said elevator with due care; and to em- " ploy for the purposes of the operation of said ele- " vator a competent and experienced person.

" V. In violation of said contract said United States " of America failed to carry your petitioner safely; " and failed to operate said elevator with due care; " and failed to employ for the operation of said ele- " vator and to put in charge of the same a competent " and experienced person; and violated its said con- " tract with your petititioner in other ways.

" VI. In consequence of the failure of the United " States and of its employees in charge of said ele- " vator to carry your petitioner safely and to operate " said elevator with due care; and in consequence of " the failure of the United States to employ a compe- " tent and experienced person to operate said elevator; " and in consequence of the incompetence and inex- " perience of the person then engaged in operating said " elevator and in charge of the same, and in conse- " quence of the said violation by the United States of " its said contract your petitioner while entering the " said elevator without negligence on his part was " caused to fall and his foot, ankle and leg were crushed " between said elevator and the top of the entrance into

" the elevator shaft or a projection in the shaft of said " elevator or in some other manner and the back of " your petitioner and other parts of the body of your " petitioner were also consequently injured and your " petitioner consequently suffered a laceration of the " ligaments of his ankle and he consequently was " caused much bodily and mental pain."

The damages claimed were $10,000 (2, 3, 5). The Court sustained the demurrer on the ground of want of jurisdiction of the person of the defendant, want of jurisdiction of the subject of the action, and because the facts alleged did not constitute a cause of action (8, 9). An examination of the opinion shows that these are three statements of the same objection, namely—that the case did not fall within the provisions of the Tucker Act (8). The Circuit Court consequently certified to this Court the question of jurisdiction, namely—" The question whether a person who is not, " and has not been, an employee of the United States, " can sue the United States in the Circuit Court of " the United States, in the district where he resides, " to recover damages to the amount of $10,000.00, " which damages were caused by personal " injury received by said person through the " negligence of an employee of the United States, " while said person injured as aforesaid was being " carried on an elevator in a public building owned " and used by the United States as a post-office and " for other governmental uses and purposes when " said person entered said elevator for the purpose of " visiting the office of the United States marshal of " such district on official business (16)."

The petition for the writ of error set forth this question of jurisdion and the two other grounds raised in the demurrer (11, 12, 26). The allowance of the writ of error (17, 37) upon this petition was in itself a sufficient certification of the question of jurisdiction.

Excelsior Pipe Co. vs. Pacific Bridge Co., 185 U. S., 282.

In accordance with the rules of this Court, we insert the

Assignment of Errors.

I. The Court erred in the making and filing and entering of a decision herein which sustained the demurrer herein, with costs.

II. The Court erred in the making and filing and entering of an order which sustained the demurrer herein.

III. The Court erred in the making, filing and entering of an order which dismissed the petition herein, with costs.

IV. The Court erred in the making and filing and entering of a judgment herein which sustained the demurrer.

V. The Court erred in the making and filing and entering of a judgment herein which dismissed the petition herein, with costs.

VI. The Court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein on the ground "that it appears on the face of the said petition that the Court has no jurisdiction of the person of the defendant."

VII. The Court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein upon the ground "that it appears on the face of the said petition that the Court has no jurisdiction of the subject of the action."

VIII. The Court erred in the making and filing and entering of a decision, order and judgment herein which sustained the demurrer herein upon the ground

"that it appears on the face of said petition that said petitioner does not state facts sufficient to constitute a cause of action against the defendant" (p. 10).

Statute.

The cause of action is founded upon the Tucker Act of March, 1887 (24 St. at L., 505); which provides:

"That the Court of Claims shall have jurisdiction "to hear and determine the following matters:

"FIRST. All claims founded upon the Constitution "of the United States or any law of Congress, except "for pensions, or upon any regulation of an Executive "Department or *upon any contract, expressed or implied*, with the Government of the United States, or "for damages, liquidated or unliquidated, in cases not "sounding in tort, in respect of which claims the "party would be entitled to redress against the "United States either in a court of law, equity, or admiralty, if the United States were suable; Provided, "however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims "growing out of the late civil war, and commonly "known as 'war claims,' or to hear and determine "other claims which have heretofore been rejected or "reported on adversely by any court, Department or "commission authorized to hear and determine the "same."

* * * * * *

"That the district courts of the United States shall "have concurrent jurisdiction with the Court of Claims "as to all matters named in the preceding section "where the amount of the claim does not exceed one "thousand dollars, and the circuit courts of the United "States shall have such concurrent jurisdiction in all "cases where the amount of such claim exceeds one "thousand dollars and does not exceed ten thousand "dollars."

I.

THE PETITIONER HAD THE RIGHT TO WAIVE ANY REMEDY THAT HE MIGHT HAVE IN TORT FOR THE NEGLIGENCE OF THE UNITED STATES AND TO SUE UPON THE IMPLIED CONTRACT OF THE GOVERNMENT TO EXERCISE CARE IN CARRYING HIM IN THE ELEVATOR.

1. *It is well settled, that when a carrier, common or special, or any other bailee injures by the negligence of the bailee or of his servants a person or a chattel which has been entrusted to his care, the injured party may waive the tort and sue in contract for damages.*

Usually at the present time the plaintiff sues in tort for the reason that the remedy in such an action is more beneficial to him. But even in such a case the action is described as *ex delicto quasi ex contractu.* The remedy in contract is now concurrent with that in tort; and anciently no such suit could be brought without an allegation of assumpsit.

Mosley vs. Fosset, Moore, 543, fol. 72*b*; s. c. 1 Roll. Abr., 4, pl. 5, (4 Eliz., rot. 183); was an action in case for the loss of a gelding delivered to defendant for safe keeping. "*Mes touts agree que* "*sans tiel special assumpsit l'action ne gist.*" "All "agreed that without such a special *assumpsit* the "action would not lie."

In Pollard vs. Railroad Co., 101 U. S., 223, this Court held that an action in assumpsit was properly brought by husband and wife on a contract by a carrier of passengers to carry the wife safely; although an action in tort would also lie for the same injury.

Philadelphia and Reading R. R. Cc. vs. Derby, 14 14 Howard, 468, 485, per Mr. Justice GRIER, : "a "traveller by stage coach or other public conveyance "who is injured by the negligence of the driver has an

" action against the owner founded on his contract to " carry him safely."

N. J. Steamboat Co. vs. Brockett, 121 U. S., 637, 645, per Mr. Justice HARLAN, speaking "of the con- " tract for safe transportation " : " The plaintiff was " entitled, in virtue of that contract, to protection " against the misconduct or negligence of the carrier's " servants."

Boylan vs. Hot Springs R. R. Co., 132 U. S., 146, 151, was an action in assumpsit for a breach of the implied contract by the carrier to protect its passengers against assaults by its agents. Mr. Justice GRAY said : " This action of assumpsit sounding in a contract *only* " and not in tort."

In Kansas Pacific Ry. Co. vs. Kunkel, 17 Kansas, 145, 166, the action was brought for breach of a contract of carriage, through the defendant's suddenly starting its train while the plaintiff was alighting therefrom ; and in consequence throwing him from the carriage to the ground, wounding, bruising and beating him, so that he suffered a rupture as well as other bodily injuries. The accident happened August 17, 1869. This action was brought in May, 1872. The defendant claimed that it was an action for damages for negligence, and consequently barred because not brought within two years as prescribed by Section 12 of the Kansas Code of Civil Procedure. The plaintiff claimed, however, and the Court *held :* that the suit was properly brought as " an action upon a contract not in writing, express or implied ;" and that consequently the three years' statute of limitation applied. Mr. Justice BREWER said :

" A second position of counsel is, that the cause of " action is not one arising from contract, but is founded " upon tort, and that therefore it was barred any way, " even if August instead of March was the time of the " injury. This claim cannot be sustained. While the " distinction between actions on contract and those for " tort is plain and broad, yet, as is well said in the " case of Staley vs. Jameson, 46 Ind., 159, on which

" counsel mainly rely, and in which is quite a full dis-
" cussion of the question, it is not always easy to de-
" termine from the allegations of the petition in which
" class the action must be placed; for contracts are
" often alleged in actions which clearly sound in tort,
" and as often tortious acts and conduct of the defend-
" ant are averred in actions purely *ex contractu*. And
" often the plaintiff has his election upon the same
" state of facts, whether to bring an action *ex con-*
" *tractu*, or on *ex delicto*. Here the pleader alleges that
" the defendant was a common carrier, that it made
" a certain contract of carriage, and received its pay
" therefor, and then alleges that defendant broke said
" contract, and how it broke it. True, in showing how
" defendant broke the contract it discloses wrongful
" acts done by defendant; but still the manifest gist
" of the action is the breach of the contract, and the
" tortious acts are simply the manner of the breach.
" The case was tried in the district court upon the
" theory that it was an action *ex contractu*, and the
" first briefs of the learned counsel were prepared upon
" the same understanding; and this was correct."

In Pennsylvania R. R. Co. vs. Peoples, 31 Ohio St., 537, 543, it was *held* that a railroad company was liable to attachment in an action by a would-be passenger for a personal injury while stepping upon the train, and that the action was one in contract.

BOYNTON, J.: " *When a person undertakes any office,*
" *employment, trust or duty, he thereby, in contempla-*
" *tion of law, impliedly contracts with those who employ*
" *him to perform that with which he is entrusted, with*
" *integrity, diligence and skill;* and, if he fails to do
" so, it is a breach of contract for which a party may
" have his remedy, in most cases, by action of as-
" sumpsit, as well as by action on the case. Corbett
" v. Packington, 6 B. & C., 268. *In 2 Greenleaf's*
" *Evidence, § 208*, the author, in speaking of the duties
" and liabilities of common carriers, whether by land
" or water, says: ' The action against a carrier, in any
" ' of these modes, is usually in assumpsit upon the

" ' contract.' While the form of the action does not " materially affect or vary the character of the evi- " dence necessary to establish the liability of the car- " rier, there is no doubt that the cause of action in the " present case arises upon contract within the meaning " of the above provision of the code."

The same rule applies to an action against a carrier for negligence which has caused injury to goods in his custody.

In Queen of the Pacific, 61 Fed. Rep., 213, 216–217, Judge MORROW said: "The counsel for claimant fur- " ther contends that the libels should have been " counted on a tort and not on a contract. The libel- " ants had the election to sue upon contract or tort. " They could stand upon the contracts of affreight- " ment, or they might waive their right to sue on the " contracts, and sue in tort. The contention of coun- " sel for claimant that, as the libelants are suing for " damages to the merchandise described in the bills of " lading or shipping receipts alleged to have been " occasioned by the negligence of the officers and crew " of the 'Queen of the Pacific,' the cause of the action " is tort and not contract, is not well founded."

Central Vermont Co. vs. Soper C. C. A., 59 Fed. Rep., 879, 887, per PUTNAM, J. (COLT and NELSON, JJ., concurred):

" Under the Massachusetts practice acts, the plaint- " iffs below combined in the declaration two classes of " counts—one on the bills of lading, or on the agree- " ments contained in them, taking the place of assump- " sit at common law, and the other in tort, based on " the common law liability of carriers and warehouse- " men, and corresponding to the common-law action on " the case for negligence. An objection was taken by " the bill of exceptions that counts of the latter class " are not sustainable. But the common law permitted " actions against carriers and warehousemen for the loss " of merchandise actually delivered into their posses- " sion to be brought either in assumpsit, or in case for " negligence, at the option of the owner of the mer-

" chandise. This is so clearly settled that it needs no " explanation here."

To the same effect are

Cooper vs. Berry, 21 Georgia, 526.
Hunt vs. Norris, 4 Martin, La. (O. S), 517, quoted *infra* at page 9 of this brief.
Orange Bank vs. Brown, 3 Wend., 158, 162, citing Jeremy on the Law of Carriers, p. 117; Chitty's Pleadings, Vol. I., 75, 6; Vol. II., 117, 271, 2.

Pomeroy on Remedies, § 568: " The single prin- " ciple upon which the entire doctrine rests is very " simple, and should—and would, if the courts were " always consistent in acting upon it,—afford a " ready and plain solution of every question, new or " old, which can be suggested. This single principle " may be thus formulated. From certain acts or omis- " sions of a party creating a liability to make compen- " sation in damages, the law implies a promise to pay " such compensation. Whenever this is so, and the " acts or omissions are at the same time tortious, the " two-fold aspect of the single liability at once follows, " and the injured party may treat it as arising from " the tort and enforce it by an action setting forth the " tortious acts or defaults, or may treat it as arising " from an implied contract and enforce by an action " setting forth the facts from which the promise is in- " ferred by the law."

Ibid, Section 570:

" It is a familiar rule that the action against a com- " mon carrier for a loss or injury of goods may either " be in tort for the violation of his general duty or on the " contract which he expressly or *impliedly* enters into. " The owner has his election which of these remedies " he will pursue."

Citing many cases.

Ibid, § 571: " Whenever the promise will be implied, " if the acts or omissions from which it is inferred are " at the same time tortious, the election to sue for the

" tort or for a breach of the contract must necessarily " exist or else it must be denied on some mere arbi- " trary and insufficient ground."

Ibid, § 573 : "The allegation of scienter is indispen- " sable in the action *ex delicto* based upon such a lia- " bility and distinguishes it in a marked manner from " the correlative action based upon an implied " promise."

Addison on Torts, Wood's Ed. :

§ 16, p. 17, speaking of this class of cases when brought in tort : "In the form of pleading they re- " sembled an ordinary tort ; but in their essence they " were breaches of contract and not tort. An instance " may be found in the case of an action against a com- " mon carrier of goods entrusted to him to carry. " * * * It is manifest, however, that in the case " supposed the duty does in fact arise out of an unex- " pressed contract, that is out of a concurrence of in- " tention in both the sender and the carrier that the " latter shall carry the goods for the former and indeed " a declaration alleging that in consideration that the " sender would deliver the goods to the carrier to be " carried for him, the carrier promises to carry them " safely was always held to be established by proof of " a delivery of the goods to the carrier to be carried. " The fact that the same cause of action could thus be " stated in two different ways, and that in one case it " was called an action of tort and in the other an ac- " tion of contract, led to some confusion as to the real " nature of the action."

It was held in an action against a livery stable keeper for negligence in allowing a horse in his care to be kicked by another horse in his stable was "founded in contract" and not in tort.

Legge vs. Tucker, 1 H. & N., 500,

and that so was an action against a cab driver for negligence in carrying a passenger's baggage.

Baylis vs. Lintott, L. R., 8 C. P., 345.

Fleming vs. Manchester, Sheffield & Lincolnshire Ry. Co., 4 Q. B. D., 81.

HEADNOTE: "The claimant alleged that the plaintiff "cause to be delivered to the defendants, as common "carriers for hire a parcel of goods to be carried from "S. to D. for reward to the defendants, but that the "defendants did not safely and securely carry and de- "liver the same, but so carelessly conducted them- "selves that it was lost * * * *Held*, that the ac- "tion was founded on contract within the meaning of "the County Courts Act."

BRAMWELL, BAGGALLEY and THESIGER, JJ.

2. *The doctrine applies to all carriers of goods or persons, and to all other bailees, whether or not there has been any undertaking upon their part, and although they do not receive compensation.*

Foulks vs. Metropolitan District Ry. Co., L. R., 4 C. P. D., 267, 281, 282, per LOPES, J. (see, also, GROVE, J., at 276, 277), the passenger had taken a ticket from one railway company and was injured in the car of another, to which he was transferred, "I think that "according to the authorities the passenger could "sue either railway A or railway B. He could "sue railway A on the contract arising from the "ticket issued by the company to carry him the "whole distance with reasonable care or caution, or "he could sue railway B as the immediate authors of "the negligence, on *the implied contract or undertaking* "*which would arise from his having been received into* "*the carriage, or from his having been invited to go into* "*the carriage of railway B and become a passenger on the* "*railway.*"

Metcalf on Contracts, 2d Ed., 5, 6:

"If a man undertakes any trust, office or employ- "ment the law raises a promise on his part to perform "his undertaking with integrity, diligence and skill; "and if he injures his employee by a want of either of "these qualties he is liable to an action on his implied "contract for reparation" (citing 1 Comyn on Contracts, 1st Ed., 6.

Warbrooke vs. Griffin, 2 Brownl., 254 ; s. c., MOORE, 876, 877 :

"It is an implied promise of every part, this is of "the part of the innkeeper, that he will preserve the "goods of his guest, and of the part of the guest that "he will pay all duties and charges which he caused "in the house."

Coggs vs. Bernard Lord RAYMOND, 909, 919, per HOLT, J :

"The owner's trusting him with the goods is a suffi- "cient consideration to oblige him to a careful man- "agement. * * * A bare being trusted with an- "other man's goods must be taken to be a sufficient "consideration if the bailee once enter upon the trust "and take the goods into his possession."

Beauchamp vs. Powley, 1 M. & Rob., 38.
Doorman vs. Jenkins, 2 A. & E., 256.

Dalstown vs. Janson, 5 Mod., 90, 92; s. c., Lord RAYMOND, 58 :

"An action against a common carrier upon the "custom of England is not so much upon a tort as "upon a contract."

Symons vs. Darkroll, Palmer, 523, HYDE, C. J. : "Delivery *fait le* contract ;" although the declaration did not allege that the defendant was a *common* carrier.

In Boson vs. Sandford, 1 Shower, 29; s. c., 1 Show, 101 ; s. c., 2 Show, 478; s. c., 3 Mod., 321 ; s. c., 2 Salk, 440 : the declaration alleged that the plaintiff had laden on board the defendants' ship divers goods to be carried from London to Topham for a reasonable freight ; that the defendants received the said goods, "and them to transfer and carry in form afore- "said did undertake ;" but that the defendants so negligently carried the same that they were spoiled. All the judges agreed that the action was upon an implied contract, which was entered into by all the owners of the ship, and that the failure to make some of them defendants was fatal to the suit. Chief

Justice HOLT said: "*This action is grounded upon the "trust, and that doth imply a contract.* In all cases "where the action is grounded on a contract, all that "are privies to the contract shall take advantage of "this omission on the general issue."

In Hunt vs. Norris, 4 Martin (O. S.) La., 517, 530, 531, it was held that an attachment would lie against a common carrier for damages to goods shipped upon the defendant's line, under a statute which only authorized attachments in actions for debt. MATTHEWS, J.:

"Obligations, arising from implication of law, are "equally binding with those, created by an express "agreement. Whether the obligation of a common "carrier to indemnify a person, who has intrusted him "with goods, which are lost by the negligence of the "former, be one, growing out of an express or implied "contract, may be doubted; but, admitting its origin "to be from implication, the indemnity due is not less "a debt. *In 2 Blacks, 464*, where the author treats of "the action of debt, it is stated that in a bailment, 'if "the bailee loses or detains a sum of money bailed to "him, for a specific purpose, he becomes indebted to "the bailor, upon the same numerical sum upon his "implied contract.' Here we see a debt may be "created by implication in a contract of bailment, "when the thing bailed is money. In express con-"tracts, we have seen that a promise to deliver any "property or goods, specified in the agreement, makes "the promisor debtor to the promisee for these goods; "and the things promised constitute a debt. The "obligations arising from implied contracts are equally "binding on the obligor, as those arising from express "contracts; therefore, the bailee of goods who loses "or detains them improperly, becomes indebted to the "bailor for those goods."

In Brown vs. Boorman, 11 Cl. & Fin., 1, 44,

Lords CAMPBELL, BROUGHAM and COTTENHAM concurring, held that the duties of a bailee rise out of a contract.

(3) *Calling the permission to use the elevator a license does not prevent the transaction from becoming a contract as soon as the licensee has acted upon the license.*

Mumford vs. Whitney, 15 Wendell, 380, 387, per SAVAGE, C. J.:

"A license to enter upon land * * * is sub-
"stantially a promise."

The license in the case at bar was not implied, as the learned District Judge seems to have thought (7). The petition expressly alleges that Mr. Bigby entered the elevator at the request of an officer and agent of the United States (2).

(4) *The operator of a passenger elevator is a carrier and is governed by the same principles of law that apply to other carriers.*

He carries passengers in a car upon wheels that operates vertically. There is no difference in principle between a common carrier and other carriers so far as the question under discussion is concerned.

The liability of the owner and operator of an elevator for passengers, after he has received a passenger for transportation, is similar to that of a common carrier of passengers.

In Marker vs. Mitchell, 54 Fed. Rep., 637, 638, Judge TAFT said: "The theory of the court was that
"the liability of Mitchell in the running of a passenger
"elevator was the same as that of a common carrier,
"and the standard for a common carrier is the high-
"est degree of care which human foresight can sug-
"gest. This view is sustained by the case of Good-
"sell v. Taylor, a decision of the supreme court of
"Minnesota, reported in 42 N. W. Rep., 873, and by
"the case of Treadwell v. Whittier, a decision of the
"supreme court of California, reported in 22 Pac.
"Rep., 266 [80 Cal., 574, 585]. It is contended that
"such a rule applies to the machinery used, but does
"not apply to the conduct of the employees of a com-

" mon carrier. No case has been cited which makes " this distinction."

II.

THIS IS NOT AN ACTION " SOUNDING IN " TORT."

As has been shown, the plaintiff had an election whether to sue in tort or in contract, and he had chosen the latter form of action. The nature of the suit is not tortious, but contractual (see Addison on Contracts, quoted, *supra*, on p. 11 of this Brief). Originally, a suit could only have been brought where a contract was expressly alleged. The permission to sue in tort, without reference to the contract, is a modern extension of the rule given in favor of the plaintiff, and is not one that should be used to his disadvantage.

Even in such a case the action is not one purely in tort, but one *ex delicto quasi ex contractu.*

Moreover, the statute does not except cases " grounded in tort," but only cases " sounding in " tort." There is a manifest distinction between the phrase " sounding in tort " and " grounded in tort." That this is so is clear from the cases of quasi contracts, founded upon purely tortious acts, where the United States has been held liable, as shown in the next point (pp. 17 and 18). The word " sounding " refers to the form of the pleading ; that is, the way it sounds when read. We need cite but a single quotation to illustrate the meaning of the phrase—namely, that from the opinion of Mr. Justice GRAY, in Boylan vs. Hot Springs R. R. Co., 132 U. S., 146, 151 (quoted, *supra*, p. 7 of this Brief). The present case sounds in tort and is grounded in tort.

III.

THE STATUTE IN QUESTION HAS ALWAYS BEEN CONSTRUED WITH THE UTMOST LIBERALITY BY THE COURTS.

It has been held, to authorize a suit against the Government, not only upon facts analagous to those here where a contract was implied from the intention of the parties without the use of any express language to that effect; but also when there was no intention or idea in the minds of any of them that a contract should be made, yet, because of the "unjust enrichment" of the defendant, by a legal fiction an implied contract was adjudicated to exist where an action for money had and received would have lain at common law. These cases the modern science of jurisprudence classifies not as implied contracts, but as quasi-contracts; yet notwithstanding this they have been held to fall within the statute.

In U. S. vs. State National Bank, 96 U. S., 30, it was *held* that the United States was liable to the plaintiff for money obtained in the Government for fraud of one of its agents. This Court said through Mr. Justice SWAYNE (p. 36):

"But surely it ought to require neither argument "nor authority to support the proposition, that, where "the money or property of an innocent person has "gone into the coffers of the nation by means of any "fraud to which its agent was a party, such money or "property cannot be held by the United States against "the claim of the wronged and injured party."

"The United States must use due diligence to charge "the indorsers of a bill of exchange, and they are liable "to damages if they allow one which they have ac-"cepted to go to protest (U. S. v. Barker, 12 Wheat., "560; Bk. v. U. S., 2 How., 711; U. S. v. Bk., 15 "Pet., 377)."

In Swift Co. vs. U. S., 111 U. S., 22 : It was held that a suit will lie against the United States to recover money illegally extorted by a Government officer.

In Bryan vs. U. S., 6 Ct. Claims, 128, and McGowan vs. U. S., 20 Ct. Cl., 147 : that the United States are liable for salvage services rendered to their ships.

The United States have often been held liable for the negligence of their officers.

In Bostwick vs. U. S., 94 U. S., 53, it was held that the United States were liable for damage caused to property " from the want of reasonable care in the " use " of the same ; and for the voluntary waste of the same by their officers who occupied it as a hospital and camp under a lease made by the plaintiff to the general in command.

In Collins & Farrell vs. U. S., 34 Ct. Cl., 294 : The United States had contracted to furnish a copper dam for the use of the plaintiffs. *Held* that the Government was liable for damages caused by the negligence of its employees in constructing the copper dam so that it leaked, although the contract for the construction of the dam did not say that there should be such a liability.

On the other hand, in Hayward vs. U. S., 30 Ct. of Claims, 219, it was *held* that the United States were not liable for damage to land adjoining Government works because of the negligent construction of a dam upon Government lands. The reason assigned for that decision was that there was no implied contract to protect the adjoining landowner.

The distinction between cases in which the Government is liable and those in which it is not is clear. Where a man uses a Government building by its permission, there is an implied contract that the Government and its employees shall not be negligent. There is no such contract in the case of the owner of land in the vicinity of a public building. The liability for an injury in such a case is purely tortious. It is an application of the maxim, *sic utere trio ut alieno non laedas.* In cases of pure tort the Government is not

liable; but where a contract can be reasonably or even artificially implied a liability on the part of the United States exists.

The liablility of the Government to make reparation in cases of this character has been recognized in Belgium. Pasicrisie B. 1852 pp. 1-370

See, also, Gerveis de Clifton's Case, Y. B. 22 Ed. 3, f. 5 pl. 12.

In Gibney vs. State of New York, 137 N. Y., 1, *held* that the State of New York was liable in damages for negligence of its employees in leaving unguarded an opening in the railing of a bridge, in consequence of which a person crossing the bridge was injured.

The United States have acknowledged the justice of similar claims.

After the fall of Ford's Theatre, Congress decided that "in equity and justice the Government should compensate the sufferers of that disaster" who were government clerks employed there, "for the injuries sustained by them"; and after a hearing before a joint commission appropriated considerable sums of money for that purpose.

28 St. at L. 397.
28 St. at L. 92.
30 St. at L. 109.

The construction of the law for which we contend will not greatly increase the number of claims against the Government. It will not make it liable for damages caused to property or persons not on Government land. It will leave the officers of the army still untrammelled in the seizure or destruction of property because of military necessity. It will impose no liability for collisions caused by the negligence of men-of-war or even of revenue cutters. It does not seek to bring within the act breaches of duties to the whole world which the law imposes upon all men, but merely the violations of the obligations to particular individuals which all persons assume by undertaking to

perform a service for them or by inviting them upon their land.

There is no reason why the statute should not be given a liberal construction and applied to the case at bar. Every consideration of public policy requires that the life and body of the citizen should have the same protection that is given to his property. Property is not more sacred than human life. In a case of this sort, where, as usual, the servant is irresponsible, there would otherwise be no remedy, for the postmaster is relieved from liability, since his subordinate is not his agent.

IV.

THE COURT HAS JURISDICTION OF THIS APPEAL.

The petition was dismissed for want of jurisdiction, and at the same term the trial Judge duly certified the question of jurisdiction (p. 16).

This establishes the jurisdiction of this Court to entertain the appeal.

> Evarts Act, of March 3, § 5, 1891, 26 St., at L., p. 827.
> U. S. vs. Jahn, 155, U. S., 109, 114, 115, per Mr. Chief Justice FULLER.

The fact that, after deciding that he had no jurisdiction, the Judge said, that the petition did not state a cause of action, does not affect this appeal. His opinion shows that he intended to hold, not that there was a defect in pleading, nor that the facts stated would not constitue a good cause of action against anyone who had operated the elevator, except the Government; but only that the petition did not state a case under the Tucker Act; because he thought that the suit was not in contract, but

sounded in tort. That was a question of jurisdiction, namely, whether the Court had jurisdiction over the United States, and whether the suit arose under a statute of the United States.

Blackburn vs. Portland, Gold Min. Co., 175 U. S., 571.

See, also,

Wetmore vs. Rymer, 169 U. S., 115.
Sheppard vs. Adams, 168 U. S., 618.
Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S., 92.
The Annie Faxon (C. C. A.), 87. Fed. R., 961.
Shields vs. Coleman, 157 U. S., 168.
Huntington vs. Laidley, 176 U. S., 668.

Moreover, after he had once ruled that he had no jurisdiction, the Judge of the Circuit Court was *functus officio*, and had no power to express an opinion upon the rest of the case. The whole case was then out of court.

In Osborn vs. U. S. Bank, 9 Wheaton, 738, 847, Chief Justice MARSHALL said:

"A denial of jurisdiction forbids all inquiry into the "nature of the case."

In Dred Scott vs. Sanford, 19 How., 393, 587, Mr. Justice CURTIS, said:

"Such an exertion of judicial power transcends the "limits of the authority of the Court."

Benjamin v. New Orleans, (C. C. A.) 74 Fed. R. 417; S. C. 153 U. S. 44.

V.

THE JUDGMENT SHOULD BE REVERSED AND THE DEMURRER OVERRULED WITH LEAVE TO THE UNITED STATES TO ANSWER, UPON PAYMENT OF THE COSTS, IN THIS COURT AND IN THE CIRCUIT COURT.

ROGER FOSTER,
Of Counsel for Petitioner Appellant.